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80-817

No.

In the Supreme Court of the United States

October Term, 1980

JANE NIDIA JIMINEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JULIUS LUCIUS ECHELES
FREDERICK F. COHN
CAROLINE JAFFE
35 East Wacker Drive
Chicago, Illinois 60601
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED FOR REVIEW

1. May Drug Enforcement Administrataion* agents engage in "cooperation" with an arrested defendant known to be represented by counsel, without advising counsel thereof?

   (A) Should the District Court have allowed petitioner's motion to dismiss the indictment on grounds that such an intentional interference with petitioner's attorney-client relationship and violation of her Sixth Amendment rights vitiates the prosecution?

   (B) Where petitioner thus was deprived of the benefit of having her attorney negotiate with government officials in connection with her "cooperation", may petitioner's conviction stand on the Seventh Circuit's rationale that, although there clearly was a violation of the attorney-client relationship, petitioner suffered no prejudice because no evidence obtained thereby was used against her?

2. Where petitioner was prosecuted for possession of drugs seized by DEA agents from the trunk of her car, within a closed paper bag which they had observed her secure in the trunk, does not the Seventh Circuit's holding that the search of the paper bag in the car's trunk was proper conflict with Fourth Amendment principles as recently expressed by this Court in *Arkansas* v. *Sanders*, 442 U.S. 743?

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* Hereafter, DEA.

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1. Where DEA agents engaged in "cooperation" with petitioner for three or four days after her arrest, and, though aware she was represented by counsel, failed to advise counsel of her "cooperation" and actively discouraged her from discussing it with her attorney, petitioner's Sixth Amendment right to counsel and her attorney-client relationship were impermissibly interfered with. The District Court should have allowed petitioner's motion to dismiss the indictment because of such intentional violation of her rights despite the fact (relied on by the Seventh Circuit to affirm) that no evidence obtained by reason of the "cooperation" was used against her at trial. Either in the enforcement of due process of law and right to counsel (as guaranteed by the Fifth and Sixth Amend-

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ments), or in the exercise of its supervisory power over the administration of justice, this Court should allow certiorari and address itself to the pressing (and, undoubtedly, prevalent) problem herein presented; particularly, whether a defendant who cooperates without knowledge of counsel has thereby been prejudiced by virtue of losing the benefit of having counsel negotiate with the authorities for benefits in exchange for "cooperation" 6

2. Where petitioner was prosecuted for possession of drugs seized by DEA agents from the trunk of her car, within a closed paper bag which they had observed her secure in the trunk, the Seventh Circuit's holding that the search of the paper bag in the car's trunk was proper—apparently based on its conclusion that petitioner had no reasonable expectation of privacy therein—conflicts with Fourth Amendment principles as recently expressed in *Arkansas* v. *Sanders*, 442 U.S. 753. Certiorari should be allowed to permit this Court to elaborate its *Sanders* holding, speaking in particular to the issue whether an individual may have a reasonable expectation of privacy in the contents of a paper bag, closed and secured in a car trunk, or whether *Sanders* is to be limited expressly only to "luggage" 11

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

NO.

JANE NIDIA JIMINEZ,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Jane Nidia Jiminez, respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, to review its decision affirming her conviction for unlawful possession with intent to distribute of a quantity of a substance containing heroin, in violation of 21 U.S.C. § 841(a)(1).

Judgment and Opinion Below

The opinion of the Court of Appeals for the Seventh Circuit, No. 79-2190, is not yet reported. A copy is attached as Appendix A, per Rule 21.1(k)(i) of this Court.

Jurisdictional Statement

On August 6, 1980, the Seventh Circuit filed its opinion affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding petitioner guilty as charged. (App. A) Petitioner's timely petition for rehearing was denied on October 8, 1980. (App. B) This Petition is timely filed within 60 days after entry of judgment by a federal court of appeals, as provided in Rule 20.1. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides, in part:

> "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

There is no issue in this Petition as to the interpretation of any statute. The statute, for violation of which petitioner stands convicted, is 21 U.S.C. § 841(a)(1).

STATEMENT OF THE CASE

Basis for Federal Jurisdiction

Petitioner was indicted for having violated a federal criminal statute, 21 U.S.C. § 841(a)(1). Per Supreme Court Rule 21.1(i), the basis for federal jurisdiction in the court of first instance is 18 U.S.C. § 3231.[1]

Statement of Facts

All facts essential to understanding and resolution of the questions presented by this Petition are contained in the Court of Appeals' opinion, App. A, and are not repeated here to avoid unnecessary duplication. The pertinent facts are briefly stated below, and a more detailed factual summary is contained in App. C.

Facts re Motion to Dismiss Indictment

For a period of three or four days following her arrest, petitioner "cooperated" with DEA agents. Though they knew she was then represented by counsel, not only did they not disclose the situation of her "cooperation" to counsel; they actively discouraged her from consulting with her attorney and directed her to keep her cooperation secret from counsel. (App. A, 5-7; see App. C, 13-17)

Petitioner's pre-trial motion to dismiss the indictment on the basis of this improper infringement upon her attorney-client relationship and Sixth Amendment right to counsel was denied (App. A, 6-7; see App. C, 13-17), and the Seventh Circuit affirmed on the ground that since no evidence obtained as a result of the post-arrest coopera-

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[1] 18 U.S.C. § 3231 provides, in pertinent part: "The District Courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

tion was used against petitioner, she suffered no prejudice by reason of the government conduct at issue. (App. A, 6-7)[2]

Facts re Motion to Suppress

After surveillance activities spanning about one month[3] established that petitioner had contact with suspected drug traffickers, she was observed receiving a brown paper bag from the driver of another car while she was in her car in a parking lot; she placed this bag and its contents, folded and closed, into the trunk of her car. (App. A, 2; see App. C, 10-12) Still under surveillance, she drove out of the parking lot, and shortly thereafter her car was pulled over by DEA agents. As one agent approached petitioner, he asked her what was in the paper bag she placed in the trunk; she replied, "You know what it is."[4] The agent then took her keys from the ignition—without her permission—opened the trunk and inspected

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[2] Moreover, the Court of Appeals expressly intimates that the DEA tactics in securing petitioner's cooperation were inappropriate (App. A, 6), and even finds that the DEA's argument that petitioner, herself, selected the precise language of the document she signed, "strains this Court's imagination" (App. A, 7)—*i.e.*, the court euphemistically acknowledges that the DEA was attempting to mislead the court. Nonetheless, because no evidence secured due to her cooperation was used against petitioner, the Court of Appeals finds no prejudice. (App. A, 6-7)

[3] The surveillance activities followed information obtained pursuant to a valid search warrant in 1976. (See App. A, 2 and fn. 2)

[4] This statement, which the District Court had suppressed, was held admissible by the Court of Appeals on appeal by the government; see *United States* v. *Jiminez*, 602 F.2d 139 (7 Cir. 1979). Its use to furnish probable cause, see *ibid.*, is not at issue in this Petition. (App. A, 2-3; see App. C, 12)

the bag, which contained the substance (containing heroin) alleged in the indictment. (App. A, 3; see App. C, 12)

The District Court denied petitioner's motion to suppress the bag and its contents seized from the trunk of her car without a warrant, and the Seventh Circuit, deciding that petitioner had no reasonable expectation of privacy in the contents of the paper bag, affirmed. (App. A, 5)

REASONS FOR GRANTING THE WRIT

1.

Where DEA agents engaged in "cooperation" with petitioner for three or four days after her arrest, and, though aware she was represented by counsel, failed to advise counsel of her "cooperation" and actively discouraged her from discussing it with her attorney, petitioner's Sixth Amendment right to counsel and her attorney-client relationship were impermissibly interfered with. The District Court should have allowed petitioner's motion to dismiss the indictment because of such intentional violation of her rights, despite the fact (relied on by the Seventh Circuit to affirm) that no evidence obtained by reason of the "cooperation" was used against her at trial. Either in the enforcement of due process of law and right to counsel (as guaranteed by the Fifth and Sixth Amendments), or in the exercise of its supervisory power over the administration of justice, this Court should allow certiorari and address itself to the pressing (and, undoubtedly, prevalent) problem herein presented; particularly, whether a defendant who cooperates without knowledge of counsel has thereby been prejudiced by virtue of losing the benefit of having counsel negotiate with the authorities for benefits in exchange for "cooperation."

While iterating, "[W]e do not condone the procedure employed by the DEA in securing appellant's cooperation after her arrest," (App. A, 6), and despite the court's euphemistic characterization—delicately inferring "fraud" —that the DEA's argument respecting whether petitioner herself selected certain language included in her written

"waiver" "strains this Court's imagination," (App. A, 7), the reviewing court affirms the lower court's order refusing to dismiss the indictment, concluding that since no evidence obtained as a result of her uncounselled post-arrest cooperation was used against her at trial, petitioner was not prejudiced by the DEA's tactics. (App. A, 6-7)

The Court of Appeals has chosen to overlook a very tangible form of prejudice suffered by petitioner here, over and above the question whether any actual evidence was procured by reason of her post-arrest cooperation; that is, the agents' conduct precluded petitioner from having counsel negotiate with the government concerning what benefits, if any, would accrue to petitioner in exchange for her "cooperation."

Integral to our criminal justice system is the *"quid pro quo"*, whereby an apprehended individual, frequently a minor participant in the overall criminal activity under investigation, agrees to "cooperate" with the prosecution,[5] usually in exchange for some benefit.[6]

Here, the government sought and obtained petitioner's uncounselled cooperation after her arrest, to such extent that she attempted to assist the agents apprehend a drug seller at great risk to her personal safety. Because she acted without advice of counsel, she was deprived of the right to effective assistance of counsel in negotiating with

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[5] "Cooperation" may take various forms, ranging from the arrestee's actions (at the government's direction) to "catch" an associate, as here, to entry of a plea of guilty, with or without accompanying testimony for the prosecution.

[6] The benefit to the cooperating arrestee may involve reduction of the charge(s), dismissal of some or all of the charges, or a promise to recommend leniency (or to make a specific (or no) recommendation) at sentencing.

the government for a benefit to herself in exchange for her cooperation.

In another context, this Court unequivocally has recognized that the right to counsel encompasses the right to effective representation in pre-trial negotiations. In explaining why there was a denial of effective assistance of counsel due to a conflict of interest in *Holloway* v. *Arkansas,* 435 U.S. 475 (1978), Your Honors held:

> "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable." *Id.* at 489-90.

Likewise, here, the DEA agents' interference with petitioner's attorney-client relationship prevented petitioner from having her counsel explore those matters with the government, optimally eventually reaching some agreement.[7] The Seventh Circuit's myopic view—that since no evidence secured after her arrest was used at trial, petitioner suffered no prejudice *via* her post-arrest cooperation—ignores the realities of negotiations between the government and arrestees, utterly overlooking the legitimate possibilities of government promises in exchange for cooperation.

While there were some differences between petitioner's and the government's evidence concerning the details of

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[7] Of course, if defense counsel had obtained an agreement from the agents (either to dismiss or reduce the charge, or for a specific recommendation), the government is bound by such agreement. *Santobello* v. *New York,* 404 U.S. 257 (1971); *Dugan* v. *United States,* 521 F.2d 231, 233 (5 Cir. 1975).

her post-arrest, uncounselled "cooperation," (see App. C, pp. 13-17), it is clear that the DEA agents, with the knowledge and approval of the United States Attorney, carried on secret dealings with petitioner which were kept from her attorney. Indeed, the reviewing court so finds. (App. A, 6-7) If only because no evidence thus obtained is used against such a "cooperator," government agents are permitted, with impunity, to deal directly with defendants—with the sanction of the U.S. Attorney in concealing such arrangements from the defendant's attorney—then the government is in a position effectively to destroy the attorney-client relationship and the constitutional, Sixth Amendment right to counsel.[8]

In affirming the District Court's order refusing to dismiss the indictment, the Seventh Circuit's opinion at bar is in direct conflict with a decision of the Third Circuit, *United States* v. *Morrison,* 602 F.2d 529 (3 Cir. 1979).[9] There, the court ordered a drug charge dismissed where

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[8] The government's conduct here specifically runs afoul of American Bar Association Disciplinary Rule DR7-104(A)(1), prohibiting a lawyer from communicating with a party he knows to be represented by a lawyer, absent prior consent of the lawyer or authorization by law.

While the context in which the following phrase was written is different, (there, the use of a "contingent fee" informer), the "bottom line" is the same:

> "[T]here comes a time when enough is more than enough—it is just too much. When that occurs, the law must condemn it as offensive, whether the method used is refined or crude, subtle or spectacular." *Williamson* v. *United States,* 311 F.2d 441, 445 (5 Cir. 1962) (concurring opinion of Circuit Judge Brown).

Here, as there, the government practice passes the line of the tolerable.

[9] See Rule 17.1(a), respecting considerations governing review on certiorari.

a DEA agent attempted to solicit cooperation directly from a defendant represented by counsel.[10]

Whether by way of its role in enforcing the mandates of the Constitution of the United States, or pursuant to its supervisory function,[11] this Court should grant certiorari and speak to the apparently all-too-prevalent practice of the government dealing directly with arrestees in derogation of the Sixth Amendment right to counsel and the attorney-client relationship. This issue has not been, but should be, decided by this Court. Specifically, Your Honors should determine whether petitioner's conviction

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[10] Before *Morrison* was decided, the Third Circuit already had found, in *Gallarelli* v. *United States*, 441 F.2d 1402 (3 Cir. 1971),

> "that the guidance of counsel during plea bargaining was so critical that a counsel-less bargain (i.e. one negotiated during a brief period when defendant was 'between' attorneys) could not be accepted." *Morrison, supra*, 602 F.2d at 533.

Likewise, in *United States* v. *Levy*, 577 F.2d 200 (3 Cir. 1978), where a DEA informer sat in on meetings between defendant and his counsel and disclosed defense strategy to prosecution officers, the reviewing court held the only appropriate sanction for the Sixth Amendment was dismissal of the indictment. See *Morrison, ibid.*

Similarly, in *Barber* v. *Municipal Court*, 24 Cal.3d 742 (1979), the court dismissed a prosecution where an undercover policeman had sat in on a meeting between the defendants and their attorneys.

For other situations involving government misconduct requiring dismissal of the charges, *cf. United States* v. *Germany*, 32 F.R.D. 421 (M.D. Ala. 1963), where an indictment was dismissed due to the government's failure to provide funds to indigent defendant's counsel for travel and subsistence expenses incurred in interviewing an informer, and *United States* v. *Seafarers International U. of No. America*, 343 F.Supp. 779 (E.D.N.Y. 1972), where the indictment was dismissed due to the government's repeated non-compliance with disclosure orders.

[11] See Rules 17.1(a) & (c), respecting considerations governing review on certiorari.

may stand under these circumstances, or whether dismissal of the indictment is appropriate.[12]

2.

Where petitioner was prosecuted for possession of drugs seized by DEA agents from the trunk of her car, within a closed paper bag which they had observed her secure in the trunk, the Seventh Circuit's holding that the search of the paper bag in the car's trunk was proper—apparently based on its conclusion that petitioner had no reasonable expectation of privacy therein—conflicts with Fourth Amendment principles as recently expressed in Arkansas v. Sanders, 442 U.S. 753. Certiorari should be allowed to permit this Court to elaborate its Sanders holding, speaking in particular to the issue whether an individual may have a reasonable expectation of privacy in the contents of a paper bag, closed and secured in a car trunk, or whether Sanders is to be limited expressly only to "luggage."

The bag and its contents, seized under the circumstances set forth at App. A, 2-3 (see also p. 4, *supra,* & App. C, 10-12), from the trunk of petitioner's automobile without a warrant, should have been suppressed pursuant to *Arkansas* v. *Sanders,* 442 U.S. 753 (1979). Finding that the search was valid as an exception to the warrant requirement, (App. A, 4), and that petitioner had no reasonable expectation of privacy, (App. A, 5), the Seventh Circuit rejected petitioner's claim that the bag and its contents—the drugs charged in the indictment—should have been suppressed. (App. A, 5)

The reviewing court holds *Sanders* inapposite, solely because *Sanders* involved luggage, and the container here at

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[12] As this Court has recognized, judicial vitiation of a prosecution because of deliberate government misconduct is used as a prophylactic tool for discouraging future actions of the same nature. *Elkins* v. *United States,* 364 U.S. 206, 217 (1960).

issue was a paper bag. (App. A, 3-4) The court purported to follow a single court of appeals decision, *United States* v. *Neumann*, 585 F.2d 355 (8 Cir. 1978), which had held there was no reasonable expectation of privacy—and hence, no Fourth Amendment violation—

> "in an unsecured cardboard box sitting in plain view in the passenger compartment of an automobile." *Id.* at 360, quoted at App. A, 5-6.

Here, on the other hand, where petitioner had placed the *closed* brown paper bag in the *locked* trunk of her car, the above rationale with respect to a container "sitting in plain view in the passenger compartment" is wholly inapplicable. On the contrary, petitioner's conduct—in full view of the DEA agents—in locking the closed paper bag in the trunk of her car, establishes that the bag contained personal items sought to be secreted, and hence, subject to that "reasonable expectation of privacy" underlying Fourth Amendment protection. This is at odds with the demonstrated conduct of the defendant in *Neumann, supra,* who could have no such expectation as tc an item in open view in the car itself.

This Court's recent decision in *Sanders, supra,* applies a concept voiced earlier in *Katz* v. *United States,* 389 U.S. 347, 351-52 (1967), that:

> "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

Under this language, any arbitrary rule of thumb that protects luggage, yet excludes Fourth Amendment protection to closed paper sacks hidden in automobile trunks, runs afoul of the purposes of the Fourth Amendment as

heretofore enforced by this Court. The Seventh Circuit's decision at bar does just that. A well-reasoned decision hinging on the defendant's reasonable expectation of privacy with respect to whether a warrant is required prior to search and seizure of various items in vehicles is *United States* v. *Dien,* 609 F.2d 1038 (2 Cir. 1979), holding that it is the manner in which the defendant treats the package, including where he places it, that determines "expectation of privacy." There, the court found the item protected by the warrant requirement, holding:

> "By placing the marijuana inside a plain cardboard box, sealing it with tape and placing it inside a van, the windows of which had been painted over and in which plywood had been placed behind the driver's seat, petitioners manifested an expectation that the contents would remain free from public examination." *Id.* at 1045.

Applying this reasoning to the facts of the case at bar, it should be held that petitioner's conduct in secreting the closed brown paper bag in the trunk of her car established her intention and expectation that the contents of the bag would remain free from public view.[13] To the extent that

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[13] Several other recent cases addressing the issue ruled in favor of the expectation of privacy; see *People* v. *Boyd,* ____ Ill. App.3d ___, 41 Ill.Dec. 484, 407 N.E.2d 982 (1 Dist. 1980) (No. 79-1213, decided June 30, 1980) (closed cardboard box in car trunk held protected); *cf. People* v. *Belton,* 50 N.Y.2d 447 (1980) (expectation of privacy in zippered, closed jacket pockets).

The sole authority seemingly to the contrary is *United States* v. *Ross,* ___ F.2d ___ (No. 79-1624), 27 CrL 2169 (D.C. Cir. April 17, 1980), holding a paper bag found in the car's trunk was not protected by the Fourth Amendment. There, though, the court specifically found that the paper bag was not being used to store

(footnote continued)

the Seventh Circuit here blindly follows *Neumann, supra,* which is inapplicable on its facts, and makes an unreasonable distinction between the "luggage" held protected in *Sanders, supra,* and a paper bag as to which petitioner has manifested her intention to secure the bag from examination by the public, the instant decision both conflicts with the Second Circuit's *Dien* holding, *supra,* and egregiously misapplies this Court's obvious intent in *Sanders.*

Certiorari should be allowed to permit this Court to determine whether the view of the Seventh Circuit at bar or that of the Second Circuit in *Dien, supra,* should be adopted, and so that Your Honors may elaborate the *Sanders* holding, speaking in particular to the issue whether an individual may have a reasonable expectation of privacy in the contents of a paper bag, closed and secured in a locked car trunk, or whether *Sanders* is to be limited expressly only to "luggage."

CONCLUSION

For the reasons expressed herein, the Petition should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES
FREDERICK F. COHN
CAROLINE JAFFE
Attorneys for Petitioner

(footnote continued)

personal items, based on the fact that it was found there by the police, rather, as at bar, specifically having been placed there by petitioner to the police's knowledge; too, the bag in *Ross* was not sealed, as was the bag here. The dissenting opinion of Judge Bazelon, *id.* at ---, 27 CrL at 2169, would hold the *Sanders* luggage warrant requirement applicable.

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-2190

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JANE NADIA** JIMENEZ,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 CR 963—Nicholas J. Bua, Judge.

Argued June 9, 1980—Decided August 6, 1980

Before SWYGERT, and WOOD, *Circuit Judges,* and LARSON,* *Senior District Judge.*

LARSON, *Senior District Judge.* Defendant Jane Nadia Jiminez appeals from a finding of guilty of unlawful possession with intent to distribute 1,019.49 grams of a substance containing heroin, in violation of 21 United States Code § 841(a)(1). She contends that certain evidence seized by the Drug Enforcement Administration (DEA) from the trunk of her automobile should have been sup-

* The Honorable Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

** Correct middle name is Nidia.

pressed. Second, the defendant argues that the DEA had no probable cause to search the automobile trunk. Finally, the defendant claims that the district court erred in refusing to dismiss the indictment because the DEA agents instructed the defendant to conceal information from her court-appointed counsel. We affirm.

Defendant, after waiving her right to trial by jury, was found guilty of violation of § 841(a)(1) on August 24, 1979, after a bench trial in the United States District Court, Northern District of Illinois.[1] The DEA had come upon information connecting the defendant to possible large scale drug transactions in the Chicago area pursuant to a valid search warrant in 1976.[2] Surveillance activities over a period of approximately one month established that the defendant had contact with other suspected drug traffickers. On the day of her arrest, defendant parked in the parking lot of a restaurant known by the DEA agents to be involved in the drug scene. A gold Oldsmobile drove through the lot and past the defendant's car three times; the driver of the Oldsmobile finally parked next to the defendant's car, and gave a brown paper bag to the defendant. After the driver of the gold Oldsmobile returned to his car, the defendant got out of her car and placed the paper bag and its contents in the trunk of her automobile.

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[1] The Honorable Nicholas J. Bua, United States District Judge for the Northern District of Illinois.

[2] In late 1976, the DEA, in cooperation with the Chicago Police Department, uncovered information relating to wholesale narcotics transactions in the Chicago area, in excess of two million dollars in value. The name "Pollo" appeared on a number of the recovered records; "Pollo" was the nickname for one Guillermo Jimenez. Further investigation revealed that Guillermo Jiminez lived at the same residence as the defendant. Periodic surveillance of the defendant resulted from this information.

Jimenez, still under the surveillance of the DEA agents, left the parking lot. Shortly thereafter, the DEA agents pulled the defendant's car over. As one of the DEA agents approached the defendant, he asked her what was in the paper bag she placed in the trunk; the defendant replied, "You know what it is." At that point, the agent opened the trunk of Jimenez's vehicle and inspected the bag, which contained 40 one-ounce packages of a substance containing heroin.

This Court has already determined that the DEA agent had probable cause to search the trunk of the vehicle. *See United States* v. *Jimenez*, 602 F.2d 139 (7th Cir. 1979):

> "As we view the case, even if the officers did not have probable cause to arrest the defendant before she made the suppressed statement, they clearly had a reasonable suspicion 'that criminal activity may be afoot,' and thus could legally stop the defendant and make inquiries. . . . Having legally stopped her and asked her but one question, she made the suppressed statement ['you know what it is'] which, assuming *arguendo* that probable cause did not already exist, provided the probable cause for the search of her trunk and seizure of the bag and her subsequent arrest." *Id.* at 142 (citations omitted).

Thus, this opinion will discuss only the first and third issues raised by the appellant.

Appellant contends that the bag and its contents, which were seized from the trunk of her automobile, should have been suppressed under the decision of the United States Supreme Court in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979). In *Sanders* the Supreme Court held that personal luggage may not be searched without a search warrant even though it is seized from the automobile:

> "Indeed, the very purpose of a suitcase is to serve as a repository for personal items when one wishes to

> transport them. Accordingly, the reasons for not requiring a warrant for the search of an automobile do not apply to searches of personal luggage taken by police from automobiles." *Id.* at 764-65.

We do not find that the decision in *Sanders* in dispositive of the issue presently before us.

As a general rule of constitutional law searches and seizures must be both reasonable and accompanied by a validly executed search warrant. *See, e.g., id.* at 758-59; *United States* v. *Chadwick,* 433 U.S. 1, 9 (1977). Exceptions to this rule do exist, however. The question before us, therefore, is whether the search of the paper bag found in the trunk of appellant's automobile was valid under an exception to the warrant requirement. Under the circumstances of this case, we find that the search was proper.

The Eighth Circuit Court of Appeals was confronted with an essentially identical situation to that before us today in *United States* v. *Neumann,* 585 F.2d 355 (8th Cir. 1978). The defendant in *Neumann* was observed placing a cardboard box in the trunk of his vehicle; later, the defendant was stopped, and the vehicle and box were seized. The cover of the box was removed and the box found to contain a controlled substance. The Eighth Circuit held that the search of the box was not justified either as incident to a valid arrest, *see id.* at 359, or under the automobile exception to the warrant requirement. *See id.* at 360. The court found, however, that there was not a sufficient expectation of privacy in the box to justify extending the warrant requirement to the facts of that case:

> "This court is of the opinion that the warrant requirement in *Chadwick* should not be extended to the facts of this case. There is simply an insufficient expectation of privacy in an unsecured cardboard box sitting in plain view in the passenger compartment

> of an automobile. The arresting officers merely lifted the lid of the box and discovered a large quantity of pills. Unlike the situation in *Stevie,* where the officers could have seized and inventoried the locked suitcase as a unit without fear of loss or theft of the contents, here it was reasonable for the officers to promptly examine the contents of the box and later to have the drugs properly inventoried and secured. This procedure protected the legitimate interests of the arresting officers, including protection against unwarranted allegations of theft or loss, and could well have protected the Neumanns in having their property properly identified, safely kept and returned had not the box contained a controlled substance." *Id.* at 360-61.

We find the reasoning of the Eighth Circuit, at least insofar as the facts of this case are concerned, to be persuasive. Although a set of facts certainly may exist where an individual has a high expectation of privacy in the contents of a box or perhaps a paper bag, we do not find that such an expectation of privacy existed here. It was just as reasonable in this case for the officers to examine and inventory the contents of the paper bag as it was in *Neumann.* Accordingly, we reject appellant's claim that the bag and its contents should have been suppressed.

After her arrest, in a conversation with two DEA agents, appellant apparently expressed a desire to cooperate with the DEA in its attempt to apprehend other parties to the drug transaction that took place in the restaurant parking lot. The exact circumstances under which this "cooperation" took place are not certain, although it is clear that Jimenez did work with the DEA for three or four days following her arrest. Such cooperation is certainly proper and to be encouraged. Since the cooperation took place, however, a dispute has arisen as to whether the DEA interfered with appellant's relationship with her attorney in securing or accepting her cooperation.

Appellant's counsel was not informed of her cooperation with the DEA until after appellant terminated the relationship. The government contends that counsel was not notified because appellant insisted that no one, including her counsel, be informed that she was cooperating with the DEA. The DEA had appellant execute a DEA Form 13 "Statement of Rights and Waiver," which consisted of a statement written by appellant of her desires with respect to her cooperation. The literal translation of what appellant wrote is as follows: "I cooperate with the Drug Enforcement. I do not want lawyer, Mr. Raymond D. [her court appointed counsel] or another defendant or advisor to know this." Appellant suggests, on the other hand, that the DEA agents advised her not to tell her lawyer and promised her that she would not be prosecuted if she cooperated. After appellant terminated her cooperation with the DEA, she advised her attorney of what had happened and moved for dismissal of the indictment because this allegedly interfered with her relationship with her attorney.

Although we do not condone the procedure employed by the DEA in securing appellant's cooperation after her arrest, we do not find that appellant had been prejudiced in any way by the above occurrences. From the record before us, and appellant has not disputed this, no information elicited from appellant after her arrest was used in the trial before Judge Bua. The bench trial was conducted on the basis of stipulated facts, all of which were within the knowledge of the DEA at the time of appellant's arrest. Finding no prejudice, there is no basis for granting a new trial or dismissing the indictment against appellant.

In reaching this conclusion, we do not suggest, however, that the tactics of the DEA in securing her cooperation were appropriate. Although the DEA suggests that appel-

lant on her own wrote down the terms of her cooperation, the wording of the waiver suggests otherwise. Appellant's native language was Spanish and she had only a few years of traditional education; it would appear that her command of English was minimal. Yet, the DEA argues that appellant, without prompting, chose the language "of another defender or advisor." This argument strains this Court's imagination. It must be remembered that the relationship between a defendant and his or her counsel is fundamental and must be protected from unwarranted intrusion. Had the DEA uncovered information reflecting on the charges against appellant, such information may well have had to be suppressed. Since no such information was uncovered, no prejudice in fact occurred. The judgment of conviction accordingly must be affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 8, 1980

Before
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. EARL R. LARSON, Senior District Judge*

No. 79-2190

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JANE NIDIA JIMENEZ,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77-Cr-963

Judge Nicholas J. Bua

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above entitled cause by the defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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* The Honorable Earl R. Larson, Senior District Judge for the U.S. District Court in Minnesota, is sitting by designation.

APPENDIX C*

STATEMENT OF FACTS

A. *Procedural History*

Jane Jimenez was arrested on October 25, 1977, by DEA agents and charged by indictment with possession of 1109.49 grams of a substance containing heroin, with intent to distribute, in violation of 21 U.S.C. 841 (a)(1). The district court denied her motion to suppress evidence and a motion to dismiss, but allowed a motion to suppress an oral statement made at the time of her arrest.

The order suppressing the statement was appealed to the Court of Appeals by the government and reversed, *United States* v. *Jimenez,* No. 78-1948 (7th Circuit), reported at 602 F.2d 139 (1979). The motion to suppress evidence was not at issue in that appeal.

On remand to the district court, the defendant moved for reconsideration of her motion to suppress evidence in light of the Supreme Court's intervening decision in *Arkansas* v. *Sanders,* 442 U.S. 753 (1979). The court, upon reconsideration, again denied the motion, this time with a written opinion.

Defendant waived a jury trial and it was stipulated that the evidence upon the pre-trial motions would be the same as that at trial. Found guilty, she was sentenced to five years in prison, the first six months to be served in confinement and the balance on probation, with an additional parole term of three years to run concurrently.

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* Adapted from Petitioner's Original Brief in the Court of Appeals, No. 79-2190. Petitioner is referred to as "defendant" herein.

B. *Statement of Facts*

i. *Facts re Motion to Suppress*

The facts regarding the seizure of evidence from the defendant's car are not in dispute. All the testimony was given by DEA agent Robert Irwin on defendant's motion to suppress.

In December of 1976, DEA agents and Chicago police, armed with a warrant, searched a trailer and recovered heroin, cocaine, $155,000 in cash, several pistols and records of wholesale narcotics transactions. (R. 9-10)* Among the records were references to a man called "Pollo" and an accompanying phone number. (R. 14-16) Investigation led to the identification of Pollo as Guillermo Jimenez. The phone number was registered to Alicia Jimenez at an address on Millard Street in Chicago. (R. 15-16) Alicia Jimenez, who is the same person as the defendant Jane Nidia Jimenez, was placed under DEA surveillance. (R. 17, 23-24)

In early 1977, Jane Jimenez moved to 4747 W. 19th Street in Cicero, Illinois. (R. 23) A check with neighbors revealed that she was living with Guillermo Jimenez. (R. 23)

From the time surveillance began, until October 25, 1977, the defendant had been watched approximately 25 times by DEA agents for a total of over 20 hours. (R. 24-25, 49) Prior to October 25, she was never seen to handle heroin or heard to discuss it with anyone. (R. 49-50) On one occasion she was followed to the Maribu Club on South Marshall Boulevard, Chicago, a club which agent Irwin identified as a "hangout for narcotic traffickers."

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* "R." refers to the Report of Proceedings at trial.

(R. 25) She talked in front of the club with Anthony Limas, a part-owner whose brother had been implicated in narcotics (R. 26-27) but no suspicious conduct was observed. No evidence was introduced to connect Anthony Limas himself to illegal drug use. Jane Jimenez was acknowledged by Irwin to be a nightclub dancer (R. 52) whose occupation requires her to work in cocktail lounges. (R. 52)

On October 25, 1977, Irwin and other DEA agents were on surveillance outside the defendant's apartment. After waiting some 2½ hours they saw her leave her building at about 5:00 in the afternoon and drive off in her red Toyota automobile. (R. 23, 29) Irwin and the others followed her to the parking lot of the Town and Country Restaurant on North Avenue, Chicago, where she parked her car in the lot and stayed in the driver's seat. (R. 31)

After approximately 15 minutes, Irwin saw an Oldsmobile driven by a Mexican man drive through the parking lot and leave, come around and pass through again and leave, and then come back a third time and park in a vacant space next to Jane Jimenez. (R. 32) The driver got out of his car carrying a brown paper bag, folded and crumpled over at the top, which Irwin described looking like a grocery bag. (R. 32-33, 53)

The two sat in the defendant's car together for a short time, "only a few moments" (R. 35), before the man returned to his own car empty-handed and Jane Jimenez got out of her car with the paper bag in her hands. (R. 34) As the man drove out of the lot, she placed the bag in the trunk of her car and closed the lid. (R. 35)

The agents, accompanied by an unmarked Chicago police car, followed the defendant to within twelve blocks of her home. (R. 36) At that point, agent Irwin radioed

instructions for the police car to stop her. (R. 36-37) As she pulled up to the curb and stepped out of her car, Irwin pulled in behind her, left his car and, walking up to her, displayed his badge and said, "Hi, Alicia. What did you place in the trunk?" (R. 36-37)

She replied, "You know what it is." (R. 37)

One of the policemen then took the keys from the ignition and without the defendant's permission, opened the trunk. (R. 38, 56) The crumple-topped bag was there. (R. 38-39) Irwin opened it and saw two other brown bags inside. Inside these bags were approximately 41 one-ounce sizes of clear plastic wrapping each containing a brown chunky powder. (R. 39) A field test for opiate deriatives on the powder was positive and Jane Jimenez was placed under arrest and her car and the powder seized. (R. 39)

Irwin acknowledged that when he saw the bag in the parking lot at Town and Country he could neither see inside it nor smell its contents. (R. 54)

The court, noting that, "[b]ut for her answer, the Court would have had a very difficult time in not allowing the motion," ruled against the defendant on her motion to suppress the evidence. (R. 70)

ii. *Facts re Motion to Dismiss*

The defense also moved before trial to dismiss the indictment on the grounds of interference by government agents in the relation between Jane Jimenez and her court-appointed attorney. The government agreed to proceed "without any of the materials obtained after she agreed to cooperate" (R. 97), but objected to dismissal on the grounds that suppression was the only appropriate remedy. (R. 98) Both Jimenez and agent Irwin testified on the motion to dismiss.

Jane Jimenez stated that she has six years of education, that Spanish is her native language, and that she neither reads nor writes English. (R. 100) After her arrest on October 25, 1977, agent Irwin talked to her while they were riding together to the Federal Building. (R. 101)

Irwin told her that she was going to be in trouble if she did not cooperate with the DEA, but if she did cooperate she would be let out, by which she understood that she would be allowed to go home and would not be arrested or prosecuted. (R. 102) Later that day, they spoke again in Irwin's office (R. 103) and Irwin told her, "if you cooperate with us, I told you before, we going [sic] to let you walk out from here, and we going [sic] to give you your car back, and you won't be in any trouble. (R. 104)

Ultimately, after further repeated assurances from Irwin that she would be "out of trouble" (R. 105), she told him or his supervisor that she had to promise to pay $26,000 for the package. (R. 106) Irwin told her then "if I deliver the money I will be okay" (R. 107) and she called the person she was to deliver the money to while Irwin and his supervisor listened in. (R. 107) The agents told her to make the delivery (R. 107) and supplied her with money. (R. 108)

After she made the delivery the next day, "he (Irwin) told me he was going to let me walk out that night and was after that he didn't let me walk out" [sic]. (R. 108-109) They put her in jail that night and she went to court the next morning. (R. 109)

In court she saw her attorney, Mr. Raymond Pijon but, "They told me I was not supposed to tell nobody about my case and the money.

Q. What did they tell you?

A. They told me not to talk to lawyer, not to talk to any lawyer." (R. 109)

Irwin talked to her, again cautioned her to talk to no one (R. 110-111) and threw away the card that attorney Pijon had given her, (R. 112) telling her, "you don't need no lawyer for this. You're going to be out." (R. 113)

He had her sign a paper which she did not understand telling her it was "just like insurance . . . just to make clear you're going to be out." (R. 113)

The day after she went to court, Jimenez delivered the money agent Irwin had given her. (R. 114) But she became suspicious of him when he told her that since she was "going to be out" she did not have to return to court if she did not want to (R. 114); and when he failed to return her car as he had said he would (R. 155) she told him she would no longer cooperate with him and was going to see her attorney. (R. 114-115) Agent Irwin again cautioned her not to tell her lawyer about the money or about her cooperation. (R. 115)

"Also", she testified, "made me sign in English some papers, but he made me write in Spanish, 'I don't need no lawyer.' " (R. 116)

Agent Irwin testified for the government. (R. 129-131)

From the time of her arrest, said Irwin, Jimenez was eager to cooperate with the agents, originally asking Irwin "if she could work something out." (R. 130) She was, however, afraid for her safety if her cooperation became known to her drug associates. (R. 130-133) "[T]hat was including her defense attorneys in the event that someone assigned her an attorney that would be connected with these people." (R. 133)

She signed a waiver of rights and a statement regarding the heroin that had been seized. (R. 134) Irwin supplied her with $26,000 to pay the supplier of the heroin, "otherwise they would know something was wrong." (R. 236)

Irwin said he made no promise to Jimenez other than to make her cooperation known to the U.S. Attorney who would, in turn, make it known to the court. (R. 137)

Jimenez's car was returned to her "under supervision" on October 26 only for the purpose of making the delivery of the $26,000, and after the delivery it was immediately taken back. (R. 139)

Ultimately, after three or four days she told him that she "didn't trust us basically, that she was going to listen to her lawyer, namely Mr. Pijon." (R. 143)

Irwin denied ever telling Jimenez that she would be in trouble if she didn't cooperate, that if she did cooperate she was going to get out of the case or that he would let her walk out the door and give her her car back. (R. 145)

He also denied telling her not to talk to her lawyer about the case. "She made us promise probably more times than I can remember that we would not tell anyone" about her cooperation for her arrest, (R. 146) he said, and she specified everyone, she meant, "a lawyer, it didn't matter who it was," (R. 146) and Irwin told her that if she was asking him to remain silent then she would have to remain silent, too, for her greatest danger was in her telling someone herself. (R. 146)

He denied ever throwing away her attorney's business card or telling her not to go to court. (R. 147) He did, however, tell her to be "very discreet" in going to the Federal Building or to Mr. Pijon's office since she was

concerned with being seen around the court and having her arrest and cooperation known. (R. 148)

Irwin also said that Jimenez's statement that he had promised her her car back was a "misunderstanding" (R. 148) and that he had only offered her the use of the car under supervision when she delivered the $26,000 to her contact.

On cross-examination, Irwin admitted that he did not provide Jimenez with a translator at any time during the first two days that he talked to her. (R. 149)

Irwin also admitted that he was in the magistrate's court when Jimenez was arraigned, that he saw Mr. Pijon there and knew that he was appointed as Jimenez's attorney. (R. 154) He acknowledged that Mr. Pijon probably told her not to discuss the case with any government agents. (R. 154) Although he knew that Mr. Pijon was the attorney of record he did not contact him before further conversation with Jimenez. (R. 155)

In response to questions by the Court, Irwin stated that the United State's Attorney's office knew that Jimenez was cooperating with the DEA, that Mr. Pijon was her attorney and that he had no knowledge of her cooperation. (R. 159-160)

The government also presented agents Thorvald Skar (R. 171-173), John Gallagher (196-203), Chicago Police Officer Fernando Correa and Assistant United State's Attorney Thomas McQueen. (R. 204-213) Skar described the forms which Jimenez signed, (R. 171-178) and essentially corroborated Irwin's denials of the promises which Jimenez had attributed to him. (R. 182-183)

Correa, a Chicago policeman assigned to the DEA, speaks fluent Spanish. (R. 193-194) He reviewed the forms signed

by Jimenez and translated the section she had written in Spanish as "I cooperate with the Drug Enforcement. I do not want lawyer, [sic] Raymond D. [sic] or another defender or advisor to know this." (R. 194)

Gallagher, supervisor of the DEA task force, corroborated Irwin as to portions of the conversation with Jimenez. (R. 196-200)

AUSA McQueen testified that he was told by Skar and Gallagher that Jimenez wanted to cooperate with the DEA but did not want her attorney to know of her cooperation, (R. 206), and he advised them to accept her cooperation provided she gave them a handwritten statement to that effect. (R. 206-207) Although McQueen knew attorney Pijon personally and knew that he was Jimenez's appointed attorney, he did not attempt to contact him or discuss the question of her cooperation. (R. 207-208)

The court denied the motion to dismiss (R. 225), noting particularly its view that Jimenez had waived her right to counsel and specifically requested that her attorney not be informed of her cooperation. (R. 225)